Editor's note: Affirmed -- Civ.No. 89-224 (ED KY, Nov. 6, 1990)

CHERRY HILL DEVELOPMENT
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 86-387; IBLA 88-655 Decided August 17, 1989

Appeals from decisions of Administrative Law Judge David Torbett affirming issuance of notice of violation and cessation order for failure to eliminate all highwalls at minesite and setting aside requirement to remove highwall. NX 4-64-R, NX 5-26-R, NX 5-9-P.

Affirmed in part; reversed in part.

1. Res Judicata -- Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Highwall Elimination -- Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally -- Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

   OSMRE will not be deemed collaterally estopped from issuing a notice of violation and cessation order for the failure to eliminate all highwalls in violation of sec. 515(b)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1265(b)(3) (1982), where the State and Federal enforcement actions did not arise from the same operative facts.

2. Surface Mining Control and Reclamation Act of 1977: Applicability: Generally -- Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Highwall Elimination -- Surface Mining Control and Reclamation Act of 1977: Roads: Generally -- Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: 2-Acre

   Where a portion of a county road used as a haul road for a surface coal mining operation is not excepted from the "affected area" under 30 CFR 701.5 (1986) and, when added to the area which the operator admits is affected by its operations, causes such operations to affect more than 2 acres, the operations will not be considered exempt from compliance with the requirement to eliminate

all highwalls set forth in sec. 515(b)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1265(b)(3) (1982).

3. Surface Mining Control and Reclamation Act of 1977: Abatement: Generally -- Surface Mining Control and Reclamation Act of 1977: Applicability: Enforcement Provisions -- Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Highwall Elimination -- Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: 2-Acre

Where, in accordance with 30 CFR 700.11(c), a state regulatory authority has, by virtue of issuing a 2-acre permit, made a determination that a surface coal mining operation is exempt from compliance with the requirement to eliminate all highwalls set forth in sec. 515(b)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1265(b)(3) (1982), and subsequently reverses that determination by taking other enforcement action inconsistent with that exemption, OSMRE will not be considered barred from taking action to require elimination of all highwalls where the offending highwall created by such operations constituted an existing violation at the time of reversal.

APPEARANCES: Vanessa M. Berge, Esq., Frankfort, Kentucky, and Charles J. Baird, Esq., Pikeville, Kentucky, for Cherry Hill Development; R. Anthony Welch, Esq., and J. Nicklas Holt, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Cherry Hill Development (Cherry Hill) and the Office of Surface Mining Reclamation and Enforcement (OSMRE) have appealed from separate decisions of Administrative Law Judge David Torbett which concern an alleged failure by Cherry Hill to eliminate highwalls at its surface coal mining operation in Pike County, Kentucky, in violation of section 515(b)(3) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1265(b)(3) (1982), and 30 CFR 715.14. While we had initially suspended consideration of these appeals, we resumed such consideration pursuant to a decision dated March 28, 1989 (Cherry Hill Development v. OSMRE, 108 IBLA 92). The instant appeal became ripe for adjudication with the filing of Cherry Hill's brief on July 20, 1989.

This case stems from issuance by OSMRE inspector Tim T. Brehm of Ten-Day Notice (TDN) No. 84-83-110-11 to the Commonwealth of Kentucky, which at that time had primary authority for enforcement of applicable surface mining laws within the state. The TDN was issued on May 31, 1984, following a May 16, 1984, inspection. In the TDN, the OSMRE inspector notified the

State that Cherry Hill had "failed to complete backfilling and grading to eliminate all highwalls" at its minesite (Exh. R-16 at 1). The area of the violation was described as "Upper mine bench, Hagy Coal Seam, approximately 500 feet." Id.

By letter dated June 19, 1984, David A. Gooch, Reclamation Regional Administrator, Pikeville Regional Office, Kentucky Department of Surface Mining Reclamation and Enforcement (DSMRE), notified OSMRE that DSMRE was "taking no action on the * * * Ten-Day Notice" because the State permit under which Cherry Hill was operating (No. 898-0010) was "issued for two acres or less with a variance to leave the highwall" and Cherry Hill had completed reclamation at the minesite in settlement of a prior notice of noncompliance issued by DSMRE (Exh. R-18).

In response thereto, on July 11, 1984, OSMRE inspector Brehm conducted an inspection of the minesite and issued notice of violation (NOV) No. 84-83-052-003 to Cherry Hill for "fail[ure] to backfill to eliminate all highwalls" (Exh. R-19 at 2). In an attached statement, the inspector stated that the "coal seam has been covered with spoil but approximately 75 feet of highwall is exposed." Id. at 3. The NOV required Cherry Hill to abate the violation by August 20, 1984, by transporting, backfilling, compacting, and grading all spoil material to eliminate the existing highwall.

On July 30, 1984, Cherry Hill filed an application for review of and temporary relief from NOV No. 84-83-052-003 with the Hearings Division, Office of Hearings and Appeals. In an amended application for review filed on September 26, 1984, with the Hearings Division, Cherry Hill asserted in part that its mining operations were then exempt from compliance with SMCRA pursuant to section 528(2) of SMCRA, 30 U.S.C. § 1278(2) (1982). At that time, section 528(2) provided that the provisions of SMCRA do not apply in the case of "extraction of coal for commercial purposes where the surface mining operation affects two acres or less." 30 U.S.C. § 1278(2) (1982). This is known as the "two-acre exemption." 1/ The case was docketed as NX 4-64-R and assigned to Judge Torbett.

Following an inspection of Cherry Hill's minesite on September 25, 1984, OSMRE inspector Brehm issued cessation order (CO) No. 84-83-052-003 on September 28, 1984, citing Cherry Hill for failure to abate the violation previously cited in the NOV. The CO required Cherry Hill to "[c]ease all coal removal," in addition to abating the violation (Exh. R-26 at 2).

On November 9, 1984, Cherry Hill filed an application for review of and temporary relief from CO No. 84-83-052-003 with the Hearings Division. Cherry Hill again asserted in part that its mining operations were subject to the 2-acre exemption. This case was docketed as NX 5-26-R and assigned to Judge Torbett.

1/ On May 7, 1987, Congress amended section 528(2) of SMCRA by deleting the 2-acre exemption. Section 201(a) of the Act of May 7, 1987, P.L. 100-34, 101 Stat. 300 (1987).

Finally, while Cherry Hill's applications for review of the NOV and CO were pending before Judge Torbett, OSMRE proposed the assessment of $ 1,200 as a civil penalty with respect to NOV No. 84-83-052-003. On December 17, 1984, Cherry Hill filed a petition for discretionary review of the proposed assessment with the Hearings Division. This case was docketed as NX 5-9-P and assigned to Judge Torbett.

By order dated March 12, 1985, Judge Torbett consolidated for purposes of a hearing and decision the three cases involving Cherry Hill's alleged failure to eliminate highwalls at its minesite (NX 4-64-R, NX 5-26-R, and NX 5-9-P).

A hearing was held before Judge Torbett on July 10 and 11, 1985, in Lexington, Kentucky, and on August 8, 1985, in Pikeville, Kentucky. On January 17, 1986, Judge Torbett issued a decision, sustaining issuance of the NOV and CO by OSMRE, but concluding that no civil penalty should be assessed with respect to the NOV. Judge Torbett concluded that the evidence clearly established that Cherry Hill's mining operations had created a highwall at its minesite by enlarging a pre-existing highwall and that the primary issue was whether Cherry Hill was entitled to the 2-acre exemption. After reviewing all of the evidence, he ruled that Cherry Hill's mining operations did not qualify for the 2-acre exemption.

On the question of a civil penalty, Judge Torbett held that Cherry Hill was properly assigned 20 points under 30 CFR 723.13(b), but that no civil penalty should be assessed where Cherry Hill was merely "follow[ing] its [State] permit requirements" in leaving the highwall (January 1986 Decision at 5). 2/

On February 21, 1986, Cherry Hill filed with the Board what was styled a petition for discretionary review, challenging Judge Torbett's January 1986 decision to the extent that it sustained issuance of the NOV and CO by OSMRE. 3/ Cherry Hill again asserted that its mining operations were subject to the 2-acre exemption. This case was docketed by the Board as

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2/ On Feb. 21, 1986, Cherry Hill asked Judge Torbett to clarify his January 1986 decision regarding whether he had directed that no civil penalty should be assessed with respect to both the NOV and CO. In a Feb. 21, 1986, response to Cherry Hill's request, at page 2, Judge Torbett stated that his decision had held only that no civil penalty should be assessed with respect to the NOV where the "question of a civil penalty for the cessation order * * * was not before [him]."

3/ The applicable Departmental regulation, 43 CFR 4.1270(a), provides for the filing of a petition for discretionary review of "an order or decision by an administrative law judge disposing of a civil penalty proceeding." Cherry Hill's filing cannot be considered a petition for discretionary review where it did not challenge Judge Torbett's favorable ruling with respect to the proposed assessment of a civil penalty. Rather, it is properly regarded simply as a notice of appeal filed pursuant to 43 CFR 4.1271(a).

IBLA 86-387. OSMRE did not seek any review of Judge Torbett's January 1986 decision.

Briefs were subsequently filed by Cherry Hill and OSMRE. On December 2, 1986, during the pendency of the appeal, Cherry Hill filed with the Board a motion to dismiss the subject NOV and CO, asserting that, at the time of issuance of the NOV and CO, OSMRE had lacked "jurisdiction" to take such action under 30 CFR 700.11(c). Cherry Hill contended that, under that regulation, OSMRE was precluded from citing Cherry Hill for a violation of SMCRA where the alleged violation had occurred at a time when there was outstanding a written determination by DSMRE that Cherry Hill's mining operations were subject to the 2-acre exemption and OSMRE then concluded that the exemption had been improperly granted. Cherry Hill argued that DSMRE had made a written determination by issuing a 2-acre permit to Cherry Hill. 4/

OSMRE responded to Cherry Hill's motion to dismiss, requesting, with the consent of Cherry Hill, that the matter of whether OSMRE was precluded from issuing the subject NOV and CO under 30 CFR 700.11(c) be remanded to Judge Torbett for an initial decision.

By order dated January 8, 1987, the Board, recognizing the need to develop a complete case record, granted OSMRE's request, remanding the case to Judge Torbett "for the sole purpose of conducting any necessary hearing and issuing a decision on whether, under 30 CFR 700.11(c), OSM[RE] lacks jurisdiction in this matter." We further stated that we would retain jurisdiction over Cherry Hill's initial appeal from Judge Torbett's January 1986 decision but stay consideration pending resolution of the jurisdictional issue. In the event of a subsequent appeal from a decision by Judge Torbett on that question, we stated that such an appeal would be consolidated with the present appeal for disposition.

Upon remand, Judge Torbett concluded in a January 20, 1987, order that the issue presented was "solely a matter of law," but afforded the parties an opportunity to request a hearing. The parties subsequently submitted briefs in support of their respective positions, but made no request for a hearing.

After receiving briefs from both parties, Judge Torbett issued a July 28, 1988, decision, concluding that OSMRE had had jurisdiction to issue the subject NOV and CO under 30 CFR 700.11(c). Relying on Harman Mining

4/ Departmental regulation 30 CFR 700.11(c) provides in relevant part that: "The regulatory authority may on its own initiative and shall, within a reasonable time of a request from any person who intends to conduct surface coal mining operations, make a written determination whether the operation is exempt under this section [including where the operation is subject to the 2-acre exemption]. * * * If a written determination of exemption is reversed through subsequent administrative or judicial action, any person who, in good faith, has made a complete and accurate request for an exemption and relied upon the determination, shall not be cited for violations which occurred prior to the date of the reversal."

Corp. v. Hodel, 662 F. Supp. 629 (W.D. Va. 1987), Judge Torbett ruled that OSMRE properly issued the NOV and CO, stating that "this was the very process that OSMRE must use to get a judicial reversal of [a 2-acre] exemption and prevent a continuation of the violation." Judge Torbett also ruled that his January 17, 1986, decision sustaining issuance of the NOV and CO constituted "judicial reversal" of Cherry Hill's exemption as of that date (July 1988 Decision at 6).

However, prior to that date, Judge Torbett ruled that Cherry Hill had had a right to rely on its exemption by virtue of issuance of a 2-acre permit by DSMRE. Thus, Judge Torbett, relying on Patrick Coal Co. v. OSMRE, 661 F. Supp. 380 (W.D. Va. 1987), ruled that, in accordance with 30 CFR 700.11(c), OSMRE was precluded from assessing a civil penalty for a violation which occurred during the time Cherry Hill had relied on the 2-acre exemption granted by DSMRE. Finally, Judge Torbett concluded that Cherry Hill could not be required to eliminate the highwall at its minesite where it was created prior to reversal of the 2-acre exemption and did not constitute an ongoing violation at the time of reversal "given the unique facts of th[e] case." Id. at 8. According to Judge Torbett, these unique facts concerned the fact that the highwall was an "essential part of [a] planned residential development, and continues to conform to the original design plan." Id. at 7.

On September 6, 1988, OSMRE filed what was styled a notice of appeal/petition for discretionary review, challenging Judge Torbett's July 1988 decision. The case was docketed by the Board as IBLA 88-655.

In its filing, OSMRE challenges Judge Torbett's disposition with respect to issuance of the NOV and CO and the proposed assessment of a civil penalty, raising various questions regarding Judge Torbett's application of 30 CFR 700.11(c). Specifically, OSMRE contends that Judge Torbett erroneously concluded that it was precluded from assessing a civil penalty and from requiring removal of the existing highwall. Cherry Hill filed an answer to OSMRE's filing, but has not initiated an appeal from Judge Torbett's July 1988 decision challenging the conclusion that OSMRE properly issued the NOV and CO consistent with 30 CFR 700.11(c).

At the outset, it is important that we determine what are the specific issues presented to the Board for resolution. Cherry Hill's initial appeal to the Board from Judge Torbett's January 1986 decision, docketed as IBLA 86-387, raises the question of whether Judge Torbett properly upheld issuance of the NOV and CO by OSMRE. That question has survived Judge Torbett's July 1988 decision to the extent that he again sustained issuance of the NOV and CO. 5/

5/ In its notice of appeal, OSMRE purports to challenge Judge Torbett's ruling in his July 1988 decision regarding the NOV and CO, presumably objecting to Judge Torbett's ruling with respect to 30 CFR 700.11(c). However, where that decision ultimately sustained issuance of the NOV and CO, OSMRE is not an "aggrieved party" who is entitled to appeal from that decision under 43 CFR 4.1271(a).

In his January 1986 decision, at page 5, Judge Torbett also concluded that no civil penalty should be assessed with respect to issuance of the NOV and, accordingly, set aside OSMRE's proposed assessment of a civil penalty. Neither OSMRE nor Cherry Hill sought review of that ruling.

Subsequent thereto, in his July 1988 decision, Judge Torbett concluded that OSMRE had been without authority to assess any civil penalties. In its September 1986 filing, OSMRE petitioned for discretionary review of that determination. However, in our March 1989 decision, we denied OSMRE's petition based on our conclusion that the petition was not filed timely under 43 CFR 4.1270(b). Moreover, we held that the question of whether OSMRE properly assessed a civil penalty with respect to issuance of the subject NOV was entitled to repose. Accordingly, we will not consider OSMRE's challenge to Judge Torbett's July 1988 decision to the extent that he dealt with the issue of whether a civil penalty was properly assessed.

Nevertheless, we conclude that OSMRE's appeal from Judge Torbett's July 1988 decision properly raises the question of whether Judge Torbett's ruling that OSMRE could not require Cherry Hill to remove the highwall at its minesite was correct.

At the outset, it is important to note that Cherry Hill does not contend that it did not create a highwall at its minesite during the course of its mining operations, by enlarging the pre-existing highwall, or that it eliminated such highwall by backfilling, compacting, and grading at the conclusion of such operations. Nor does Cherry Hill challenge the fact that the operator of a surface coal mining operation is required by section 515(b)(3) of SMCRA and 30 CFR 715.14 to "backfill, compact * * *, and grade in order to restore the approximate original contour of the land with all highwalls * * * eliminated." 30 U.S.C. § 1265(b)(3) (1982).

Rather, in its brief in support of its initial appeal to the Board, Cherry Hill challenges issuance by OSMRE of the NOV and CO on two bases, viz., that OSMRE was precluded from taking enforcement action with respect to the same violation which had been previously disposed of in a State enforcement action, citing Excello Coal Corp. v. Clark, No. CIV-3-84-902 (E.D. Tenn. Dec. 28, 1984), and that its mining operations were entitled to the 2-acre exemption.

The facts upon which Cherry Hill relies to support its assertion that OSMRE was precluded from taking enforcement action by virtue of prior State action are not in dispute. The record indicates that on September 20, 1983, following a September 19, 1983, inspection of the area permitted under State permit No. 898-0010, DSMRE inspector Gary L. Scott issued a "Notice of Non-Compliance and Order for Remedial Measures" (No. 05-1623), charging Cherry Hill in part with having engaged in various activities outside the permitted area, including the placement of spoil, and having failed to backfill "according to permit" in violation of the backfilling and grading requirements of 405 Ky. Admin. Regs. 1:130 (Exh. A-14). Cherry Hill was ordered to complete coal removal and begin reclamation on the permitted area by November 20, 1983. DSMRE subsequently extended the deadline to December 20, 1983. See Exh. A-15.

On December 22, 1983, OSMRE inspector Brehm, pursuant to a citizen's complaint, issued TDN No. 83-83-110-9 to the State of Kentucky. The TDN notified the State of several violations by Cherry Hill, including mining without a valid permit where the "operator has exceeded the original 2-acre permit by disturbing approximately 6 acres" (Exh. R-6). The TDN contained no reference to any failure by Cherry Hill with respect to backfilling. 6/

By letter dated January 5, 1984, Jolene Crawford, Chief Reclamation Inspector, Pikeville Regional Office, DSMRE, notified OSMRE that "no enforcement action [would be] taken against Cherry Hill" by DSMRE (Exh. R-7 at 1). With respect to mining without a permit, she stated that the 6 acres had been disturbed in connection with Cherry Hill's development of the area for purposes of construction of thirteen residential houses and that the mining of coal, which had been initiated after development began and was incidental to that development activity, had never exceeded the 2-acre area permitted by the State.

Thereafter, pursuant to an agreement reached between DSMRE and OSMRE regarding TDN No. 83-83-110-9, DSMRE, on January 16, 1984, modified its notice of noncompliance to provide that Cherry Hill would cease all coal removal and reclaim the permitted area. See Exhs. A-20 and 21. The stated basis for this modification was that a "survey indicates mining operations area exceeds 2 acres substantially" (Exh. A-20). In response thereto, OSMRE inspector Brehm, in a February 17, 1984, letter, notified DSMRE that its modification was "deemed adequate to take care of the TDN" (Exh. R-14).

The record indicates that the deadline for compliance with DSMRE's notice of noncompliance was extended to February 20, 1984. See Exh. A-25. As a result of a February 27, 1984, inspection which disclosed in part that Cherry Hill had "not reclaimed any area on or off permit" (Exh. A-24), DSMRE issued an "Order for Cessation and Immediate Compliance" (No. 05-0030) on March 5, 1984, which order required Cherry Hill to begin final reclamation "of all areas on permit and areas disturbed outside of permit as a result of mining operations" (Exh. A-25). The CO noted that the removal of coal had been completed.

Subsequently, DSMRE and Cherry Hill entered into an Agreed Order, in satisfaction of the notice of noncompliance and CO, under which Cherry Hill admitted various violations, including violation of the backfilling and grading requirements of 405 Ky. Admin. Regs. 1:130, and agreed to pay a civil penalty in the amount of $ 2,900 (Exh. A-11). The order was signed by representatives of DSMRE and Cherry Hill, respectively, on May 23 and 31,

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6/ In its brief, Cherry Hill asserts that TDN No. 84-83-110-11 cited the "same condition" previously cited in TDN No. 83-83-110-9 (Appellant's Brief at 2). The record indicates otherwise. The second TDN specifically cited Cherry Hill for failing to complete backfilling and grading so as to eliminate the highwall in the case of the "Upper mine bench, Hagy Coal Seam" (Exh. R-16 at 1). The first TDN, however, makes no mention of any purported violation involving backfilling, grading or elimination of highwalls.

1984, and was approved by the Secretary, Kentucky Natural Resources and Environmental Protection Cabinet, on June 20, 1984.

Based on these facts, Cherry Hill argues, relying on Excello, that OSMRE was precluded from issuing an NOV and a CO with respect to Cherry Hill's failure to backfill so as to eliminate all highwalls at its minesite where DSMRE had previously issued a notice of noncompliance and CO and finally assessed a civil penalty with respect to the "same set of facts" (Appellant's Brief at 7).

[1] Excello stands for the proposition that OSMRE will be collaterally estopped from taking enforcement action with respect to a specific violative condition previously subject to enforcement action by a state where both actions arise from the same operative facts, the issue raised is finally litigated by the state, and OSMRE and the state are in privity.

However, the doctrine of collateral estoppel has no application in this case because both enforcement actions did not arise from the same operative facts. It is clear that the violation charged in DSMRE's notice of noncompliance concerned failure to backfill "according to permit" (Exh. A-14). Cherry Hill's 2-acre permit, which provided for creation of a highwall in the course of mining the Hagy coal seam, specifically stated that: "Under new law, the highwall will remain. We will, however, cover the coal seam to an approximate height of four (4') feet above the seam itself" (Exh. A-8 at 7). According to Cherry Hill's permit application, this would leave a highwall more than 50 feet in height. See id. at 8.

[2] Secondly, Cherry Hill argues that OSMRE lacked the jurisdiction to issue the NOV and CO where its mining operations were entitled to the 2-acre exemption. As noted supra, at the time of Cherry Hill's mining operations, section 528(2) of SMCRA exempted surface coal mining operations "affect[ing] two acres or less" from compliance with the statute. 30 U.S.C. § 1278(2) (1982). The burden of demonstrating that its operations came within the ambit of this statutory section rests with Cherry Hill. S & S Coal Co. v. OSMRE, 87 IBLA 350, 354 (1985).

In his January 1986 decision, Judge Torbett considered the question of whether Cherry Hill's mining operations qualified for the 2-acre exemption. Initially, he concluded that it was "virtually impossible to tell what land was disturbed by the housing development project and what land was disturbed by coal mining" (January 1986 Decision at 3). The record indicates that development activity, which was said to have affected 6 acres, encompassed much, if not all, of the area later affected by mining operations, including the area above the Hagy coal seam. See Tr. 211-13, 218-19, 284, 459-60.

Nevertheless, Judge Torbett concluded that the area affected by Cherry Hill's mining operations exceeded 2 acres where a portion of a county road (No. 1279), used as a haul road by Cherry Hill, was added to what Cherry Hill had accepted as the area affected by its operations. See Tr. 428, 439-40, 458-59. That area, which includes the two access roads running from the county road to the minesite, contains 1.99 acres as depicted on

a July 29, 1985, survey map (Exh. B) prepared for Cherry Hill by a private registered land surveyor.

The bulk of Judge Torbett's analysis concerns his rationale for including the portion of the county road not recognized by Cherry Hill in the affected area, using the criteria in 30 CFR 701.5 (1986). That regulation provided that the term "[a]ffected area" includes "all areas covered by new or existing roads used to gain access to, or for hauling coal to or from, surface coal mining and reclamation operations, except as provided in this definition." 30 CFR 701.5 (1986). The exception involves where the road "(a) was designated as a public road pursuant to the laws of the jurisdiction in which it is located; (b) is maintained with public funds, and constructed, in a manner similar to other public roads of the same classification within the jurisdiction; and (c) there is substantial (more than incidental) public use." Id.

Pursuant to a district court opinion in In re Permanent Surface Mining Regulation Litigation, No. 79-1144 (D.D.C. July 15, 1985), the Department, effective December 22, 1986, suspended the definition of "[a]ffected area * * * insofar as it excludes roads which are included in the definition of 'surface coal mining operations'" (51 FR 41960 (Nov. 20, 1986)). However, at the time of the enforcement action taken herein by OSMRE, the regulatory language excepting certain public roads was in effect. Thus, we will, as did Judge Torbett, apply that language. See Rapoca Energy Co. v. OSMRE, 89 IBLA 195 (1985).

In his January 1986 decision, Judge Torbett concluded that testimony at the hearing clearly established that the county road was a designated public road which was maintained with public funds in a manner similar to other public roads of its class in the county. He, therefore, focused on the question of whether there had been substantial public use during the period in question. After reviewing the evidence, he concluded that a 500-foot segment of the county road from the sedimentation pond to the minesite had not received substantial public use and that, when added to the 1.99-acre area accepted by Cherry Hill as affected by its mining operations, those operations exceeded 2 acres. He therefore concluded that Cherry Hill's surface coal mining operations did not qualify for the 2-acre exemption.

In its brief, Cherry Hill contends that the 500-foot segment of the county road should not be included in the area affected by its mining operations where the road received substantial public use during the period in question. As proof of this, Cherry Hill, at page 9 of its brief, points to testimony that, at the time it obtained a 2-acre permit from the State in 1982, there were 8 to 9 residents of houses along the road who used the road. See Tr. 388.

However, as Judge Torbett noted in his January 1986 decision at page 4, according to the testimony of Darius Sullivan, the three houses occupied by these residents and an additional four houses were torn down near the beginning of Cherry Hill's residential development activity which began in 1981. See Tr. 219, 449-50. That testimony also indicated that five additional

[*195] houses were no longer standing at that time. The base map submitted with Cherry Hill's application for a 2-acre permit in August 1982 indicates the presence of 12 "non-existent building[s]" in the vicinity of the county road (Exh. A-9). See Exh. R-29; Tr. 111-12, 128. The OSMRE inspector testified that he observed no standing houses at the time of his initial inspections in December 1983 and January 1984. See Tr. 131-32. Thus, use of the road by the existing residents cannot be recognized as a basis for determining whether the county road was receiving substantial public use at the time OSMRE issued its NOV and CO in 1984.

Cherry Hill also refers in its brief, at page 10, to other testimony regarding use of the county road in order to gain access to the forested area north of the minesite for purposes of hunting and cutting timber. See Tr. 450. At best, the testimony of Darius Sullivan indicates that the road was used "a couple of times a week" (Tr. 291). However, as Judge Torbett properly concluded in his January 1986 decision, at pages 4-5, such testimony indicates merely incidental use of the road. The road, which is described as a dirt and gravel road less than half a mile in length, reaches a dead end in the forested area shortly after it passes the minesite and provides no access to any commercial or residential area. See Tr. 369, 377-78; compare with Harman Mining Corp. v. OSMRE, 87 IBLA 369, 372-73 (1985).

Therefore, we agree with Judge Torbett that, at the very least, the 500-foot segment of the county road cannot be considered a public road which should be excluded from the area affected by Cherry Hill's surface coal mining operations, within the meaning of section 528(2) of SMCRA. In these circumstances, we conclude that the affected area clearly exceeded 2 acres and Cherry Hill's mining operations, thus, cannot be deemed to have qualified for the 2-acre exemption at the time of issuance of the NOV and CO by OSMRE. 7/ See OSMRE v. C-Ann Coal Co., 94 IBLA 14 (1986). Thus, we affirm Judge Torbett's January 1986 decision upholding issuance of the NOV and CO on that basis.

[3] Finally, we consider the question properly raised by OSMRE's appeal of Judge Torbett's July 1988 decision, viz., whether OSMRE could, consistent with 30 CFR 700.11(c), properly require Cherry Hill to eliminate the highwall at its minesite where the highwall was created at a time when Cherry Hill was operating pursuant to the 2-acre permit issued by DSMRE.

OSMRE also contends that the question of whether it was barred from requiring elimination of the highwall falls outside the scope of the Board's January 1987 remand where it was not placed before Judge Torbett for resolution as a result of that remand and, thus, should not have been considered

7/ Further support for our conclusion that Cherry Hill's mining operations affected more than 2 acres within the meaning of section 528(2) of SMCRA is provided by DSMRE's reassessment, following issuance of the 2-acre permit, which led it to also conclude that such operations were affecting more than 2 acres. See Exhs. A-14, A-20 and R-43; Tr. 340-41, 343.

by him. OSMRE concludes that Judge Torbett's July 1988 decision should be reversed on that basis alone. Our remand, however, was expressly designed to resolve the question of whether OSMRE had "jurisdiction" in the matter of issuance of the NOV and CO under 30 CFR 700.11(c). The required abatement under the NOV and CO was elimination of the highwall. Thus, the question of whether OSMRE properly ordered removal of the highwall was within the scope of the remand.

OSMRE's appeal raises several questions regarding application of 30 CFR 700.11(c). The primary question is whether issuance of the 2-acre permit constituted a determination by the State that Cherry Hill's mining operations were exempt. Assuming that it did, the next questions are whether and when such determination was reversed and, assuming it was, whether OSMRE was then precluded from requiring elimination of the highwall.

In his July 1988 decision, Judge Torbett did not specifically rule that issuance of the 2-acre permit by the State constituted a "written determination" that Cherry Hill was exempt from compliance with SMCRA within the meaning of 30 CFR 700.11(c). However, that ruling was clearly implicit.

In its appeal, OSMRE now challenges this ruling, despite its earlier conclusion, expressed in its Reply to Petitioner's Motion at page 1, that Cherry Hill had "received a written determination of exemption." OSMRE contends that issuance of the 2-acre permit cannot constitute the "written determination" of exemption contemplated by 30 CFR 700.11(c) where it was not obtained on the basis of a complete and accurate request for an exemption because Cherry Hill did not disclose the "true extent of intended haul road disturbance" at the time it applied for a 2-acre permit (OSMRE SOR at 13). We agree that application of 30 CFR 700.11(c) would be vitiated where an operator obtained an exemption on the basis of an incomplete and/or inaccurate request. However, OSMRE has not established that Cherry Hill's request was not complete and accurate when submitted, or, stated differently, that Cherry Hill then knew that its mining operations would eventually exceed 2 acres.

In addition, OSMRE contends that issuance of the 2-acre permit cannot constitute a "written determination" where it would, by its terms, become null and void upon violation of its terms and, thus, was not subject to administrative or judicial reversal, as contemplated by 30 CFR 700.11(c). We do not agree with this analysis. The automatic voiding of a 2-acre permit because of a violation, pursuant to the permit's administratively required terms, is no less administrative "action" within the meaning of 30 CFR 700.11(c) than where the regulatory authority must take separate action for the same reason. There is nothing in the regulation which would make it applicable in the later instance, but not in the former.

The next question concerns whether and when such determination of exemption was reversed by "administrative or judicial action." 30 CFR 700.11(c). OSMRE argued before Judge Torbett that the June 1984 Agreed Order of DSMRE, in which Cherry Hill admitted to the violations charged in DSMRE's notice of noncompliance, including disturbing land outside the

permitted area, constituted an administrative reversal of the determination of exemption. Judge Torbett eschewed this analysis, concluding instead that reversal of the determination did not occur until his January 1986 decision upholding the validity of OSMRE's NOV and CO on the basis that Cherry Hill's mining operations had exceeded 2 acres. On appeal, OSMRE no longer contends that the June 1984 Agreed Order of DSMRE constitutes the reversal of the determination of exemption, concluding that issuance of the NOV thereby reversed the determination as of the date of issuance where it was sustained by Judge Torbett. See OSMRE SOR at 15-16.

We conclude that a determination of exemption will not be deemed finally reversed within the meaning of 30 CFR 700.11(c) until the applicable administrative or judicial review process has been exhausted. The preamble to the proposed rule which became 30 CFR 700.11(c) indicates that a determination of exemption will not be deemed to have occurred until a "final determination [that an operation is not exempt] is rendered" (47 FR 53 (Jan. 4, 1982)).

Judge Torbett then considered the question of whether the highwall, which formed the basis for issuance of the NOV and CO, constituted an existing violation of SMCRA at the time of reversal of the determination of exemption. He concluded that the highwall was not an existing violation where it was "an essential part of the planned residential development, and continues to conform to the original design plan [for that development]." Id. He reasoned that, because the highwall was an integral and legitimate part of the planned development, Cherry Hill should not, consistent with the equitable principles upon which 30 CFR 700.11(c) is based, be required to remove the highwall.

We do not agree with Judge Torbett's analysis. There is no question that the highwall left by Cherry Hill's mining operations constituted an existing violation of section 515(b)(3) of SMCRA at the time of reversal of the determination of exemption where the land had clearly not been restored to its approximate original contour.

We accept the fact that Cherry Hill had originally intended to leave a highwall as part of its development of residential houses. See Exhs. A-6, A-7; Tr. 204-05, 207-08, 211-12, 221, 223. Moreover, we know of no local, State or Federal law which would have precluded Cherry Hill from leaving a highwall as a part of such development.

However, the fact remains that after beginning its intended development, Cherry Hill decided to initiate operations for the removal of the coal discovered in the course of its development activity. At that time, such operations arguably became subject to regulation under SMCRA and its State equivalent. Assuming that Cherry Hill's mining operations initially qualified for the 2-acre exemption, it is clear that, once those operations affected more than 2 acres, they became subject to such regulation.

However, at that time, Cherry Hill was operating under a 2-acre permit, which we have recognized as a written determination that such operations

were exempt from compliance with SMCRA. Departmental regulation 30 CFR 700.11(c) precludes OSMRE from citing Cherry Hill for a violation which occurred during the time prior to reversal of that determination. However, it does not, as noted supra, preclude OSMRE from citing Cherry Hill for a violation which was created by Cherry Hill's mining operations and which still existed at the time of reversal of the determination of exemption. To hold otherwise would, in the words of the district court in Harman Mining Corp. v. Hodel, supra at 634, "effectively cripple OSM[RE] of any enforcement power * * *. OSM[RE] could reverse a state's regulatory authority decision of exemption, but would be powerless to correct the existing violation." (Emphasis added.) The same holds true where the State itself reverses a prior determination of exemption and OSMRE decides to take enforcement action after the State fails to take appropriate action in response to a TDN, as was the case herein.

Moreover, we can find no exception in 30 CFR 700.11(c) which precludes OSMRE from taking enforcement action, including requiring abatement of the cited violation, merely because the violative condition has originally been incorporated in a legitimate nonmining plan with respect to the affected land.

We have held that the requirement to backfill so as to eliminate all highwalls created by surface coal mining operations and, thus, to restore the land to its approximate original contour is an absolute requirement. River Processing, Inc. v. OSMRE, 76 IBLA 129, 137-38, 90 I.D. 425, 429-30 (1983), aff'd, River Processing, Inc. v. Clark, No. 83-316 (E.D. Ky. May 2, 1985). Thus, we have expressly concluded that a highwall will not be permitted to remain following the conclusion of mining even though leaving the highwall might facilitate the intended postmining use of the land. Id. at 136-37, 90 I.D. at 429 (referring to Tollage Creek Elkhorn Mining Co., 2 IBSMA 341, 87 I.D. 570 (1980), aff'd, Tollage Creek Elkhorn Mining Co. v. Watt, No. 80-230 (E.D. Ky. Sept. 1, 1982)). That is the situation here.

Accordingly, we conclude that OSMRE was not precluded by 30 CFR 700.11(c) from requiring the elimination of the highwall created by Cherry Hill's mining operations. Therefore, we reverse the July 1988 decision of Judge Torbett holding to the contrary.

It should be noted, however, that Cherry Hill is only required to backfill so as to remove the highwall created by its mining operations. River Processing, Inc. v. OSMRE, supra at 141-42, 90 I.D. at 432. Cherry Hill is not required to remove the pre-existing highwall where its mining operations did not disturb that highwall. See Cedar Coal Co., 1 IBSMA 145, 86 I.D. 250 (1979).

To summarize, we affirm Judge Torbett's January 1986 decision to the extent that he upheld issuance of the subject NOV and CO by OSMRE on the basis that Cherry Hill's mining operations did not qualify for the 2-acre exemption, and reverse Judge Torbett's July 1988 decision to the extent that he concluded that OSMRE could not properly require removal of the highwall created by those operations.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the January 1986 and July 1988 decisions of Judge Torbett are, respectively, affirmed in part and reversed in part.

John H. Kelly
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge.